No. 11,007

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ONE PLYMOUTH TRUCK, 1940 PICKUP,
MOTOR NO. T-105-2887,
Respondent-Appellee,

and

MIGUEL MORACHIS,
Claimant-Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona.

BRIEF FOR APPELLEE.

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JURISDICTION OF THE DISTRICT COURT.

The District Court had jurisdiction of this proceeding under Section 24 (9) of the Judicial Code as amended (28 U. S. Code, Section 41 (9)) as this is a suit or proceeding for the enforcement of forfeitures incurred under the laws of the United States. (R. 2, 4, 10, 11, and 14.) The laws of the United States involved are: Title VI of the Espionage Act of 1917, i.e., the Act of June 15, 1917, Chapter 30, 40 Stat. 223-225 as amended, 22 U. S. Code, Section 401-408 inc.; and

the Export Control Law of 1940 as amended, i.e., Section 6 of the War Powers Act of July 2, 1940, Chapter 508 (54 Stat. 714), as amended by the Act of June 30, 1942, Chapter 461 (56 Stat. 463), as further amended by Act of July 1, 1944, Chapter 360, 58 Stat. 671; 50 App. U.S.C. Sec. 701.

JURISDICTION OF THIS COURT.

This is an appeal from a final decision in the District Court for the District of Arizona, and no direct review may be had in the Supreme Court under Section 238 of the Judical Code. (28 U.S.C. Sec. 345.) This Court therefore has jurisdiction of this appeal under Section 128 of the Judicial Code (28 U.S.C. Sec. 225 (a)), as amended.

PRELIMINARY STATEMENT.

This is an appeal by the United States of America from a judgment rendered January 27, 1945 by the District Court of the United States for the District of Arizona in which judgment the Court ordered that one Plymouth truck be restored to Miguel Morachis, the present claimant-appellee, said Court holding as a conclusion of law that said truck was not about to be exported, shipped from, or taken out of the United States into the Republic of Mexico in violation of law, and further, that Title VI of the Espionage Act of 1917 does not authorize forfeiture of the vehicle,

despite the fact that said vehicle contained articles about to be unlawfully exported, but that said Espionage Act only authorizes seizure and detention of the vehicle so used. (R. 14.)

STATEMENT OF FACTS.

The facts are undisputed, and, concisely summarized, are: That Rodolfo Tapia, an employee of Miguel Morachis, in the absence of his employer (R. 13) who was out of town at the time, attempted to use Miguel Morachis' Plymouth truck to smuggle some lemons, grapefruit, and canned milk to Mexico by means of subterfuge and without a special license from the Foreign Economic Administration. Said truck and merchandise were promptly seized by the Collector of Customs at the Port of Nogales, Arizona. Within 30 days after said seizure a verified petition was filed in the District Court of the United States for the District of Arizona by Miguel Morachis claiming that he was the owner of said Plymouth truck and that said truck was not intended to be exported from the United States of America to the Republic of Mexico and requesting that said truck be restored to him.

At the trial, it was developed that said truck was registered under the laws of Arizona, was in constant daily use between the border towns of Nogales, Arizona and Nogales, Mexico for a period of about two years prior to the date of seizure (R. 12) and that

said truck was used by Morachis at Nogales, Arizona in his produce business. (R. 13.) Said truck had not been driven by Morachis for about five months prior to the seizure. The truck at the time of seizure was being driven by Tapia. (R. 13.) Tapia, and other employees of Morachis, used said truck with the intention of smuggling said produce and canned milk to Mexico. (R. 13.) Morachis was not a participant, either as principal or accessory, directly or indirectly, in the attempted smuggling. It is an undisputed fact that the truck itself was not being attempted to be exported to Mexico. The truck is registered in Arizona and belongs to Morachis who has his business and residence in the United States of America. (R. 11; R. 12; R. 13.) Said District Court ordered said truck restored to Morachis, and this appeal followed.

QUESTION INVOLVED.

As the agreed facts, so far as they are material to this appeal, are:

1. The articles (lemons, grapefruit and canned milk) were attempted to be unlawfully exported to Mexico by Morachis' employees without his knowledge and consent;

2. Morachis' truck was the vehicle used for the attempted unlawful exportation of said articles;

3. The truck itself was not being exported, shipped out of, or taken out of the United States in violation of law;

the question before this Court is resolved into a matter of law, e.g., whether or not Title VI of the Espionage Act of 1917, 22 U.S.C. Sec. 401-408 incl., authorizes forfeiture of Morachis' truck if it was used by his employees to take out or attempt to take out articles from the United States of America to Mexico in violation of law.

The position of Miguel Morachis, the claimant appellee, is that the statute authorizing the forfeiture of articles attempted to be exported contrary to law does not forfeit the vehicles containing such articles. The statute authorizes the seizure of such articles and the seizure of the vehicle containing them, but its forfeiture provisions covers only the articles themselves (in this case, the lemons, grapefruit, and canned milk); its foreiture provisions does not extend to and include the vehicle. Congress never intended that the vehicles be forfeited; for the whole purpose of Congress was to control ocean-going vessels and attempted unlawful exports of articles in said vessels. The vessels were to be seized and detained and not unnecessarily delayed (hence the reason for the summary hearing and admiralty procedure provided in the Act (22 U. S.C., 403-405), and the articles, but not the vessels, forfeited. Maritime traffic alone was considered by Congress, unique border traffic in time of war was not considered at all.

ARGUMENT.

POINT I.

THE STATUTE DOES NOT AUTHORIZE THE FORFEITURE OF VEHICLES CONTAINING ARTICLES ATTEMPTED TO BE EXPORTED CONTRARY TO LAW.

The correctness of appellee's contention is made manifest by a reading of the statute, 22 U.S.C. 401; with its pertinent parts italicized, it is as follows:

> "Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, *the several collectors,* comptrollers of customs, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, *may seize* and detain *any articles* or munitions of war *about to be exported or shipped from, or taken out of the United States in violation of law and the* vessels or *vehicles containing the same,* and retain possession thereof until released or disposed of as directed in sections 402-408 of this title. *If* upon due inquiry as provided in such sections *the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States.*"

It is clear that the statute does not expressly forfeit the vehicle containing the prescribed articles.

Such forfeiture can be read into the statute only by implication from the fact that it authorizes the seizure of the vehicle and from the fact that at the time the vehicle was about to be taken out of the country it was the instrumentality for a violation of law. This, however, would be contrary to all established constructions of forfeiture statutes.

POINT II.

AS FORFEITURES ARE NOT FAVORED THEY SHOULD BE ENFORCED ONLY WHEN WITHIN BOTH THE LETTER AND SPIRIT OF THE LAW.

The general principles of construction of forfeiture statutes is expressed in 23 American Jurisprudence 601 as follows:

> "Statutes imposing forfeitures by way of punishment are subject to the general rules governing the interpretation and construction of penal statutes. Hence, statutes authorizing the forfeiting of property ordinarily used for a legal purpose are to be strictly construed, since they are very drastic in their operation. It has been pointed out, however, that statutes to prevent fraud upon the revenue laws are considered as enacted for the public good and to suppress a public wrong and, therefore, although they impose forfeitures, are not to be construed, like penal laws generally, strictly in favor of the defendant, but are to be construed fairly and reasonably, so as to carry out the intention of the legislature. In accordance with the general principle that the courts sedulously avoid a construction

> which is tantamount to judicial legislation, the courts will not force upon a forfeiture statute a construction which amounts to reading into the law provisions not inserted therein by the legislature."

The revenue of the government is not involved in the case and, therefore, the statute in question is to be construed strictly in favor of the defendant. Nevertheless, even the more liberal rule of construction would not enable a Court to find authority for the forfeiture of the vehicle in the above quoted statute.

> "Forfeitures are odious, and to be declared only when clearly imposed by statute." Judge Bourquin in United States v. Two Gallons of Whisky, et al., 213 Fed. 986.

> "A statute imposing a forfeiture should be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation." Judge Sanford in *United States v. One Cadillac Eight Automobile,* 255 Fed. 173.

United States v. One Model Ford V-8, 307 U. S. 219, 59 S. Ct. 861, recently laid down the rule for the construction of forfeiture statutes as follows:

> "The point to be sought is the intent of the lawmaking powers. Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."

Counsel did not find a case on point involving the war powers, but in *1942 Chevrolet Automobile v. State,* 128 Pac. (2d) 448, the Court said:

> "The law does not favor forfeiture though *police powers* may be involved, and statutes are strictly construed to avoid them."

The intent of Congress not to forfeit vehicles involved in cases under 22 *U.S.C.* 401 is established clearly by a comparision with other forfeiture statutes of the United States. Such statutes found by counsel in the United States Code are the following:

> Forfeiture of merchandise, baggage and vehicle containing same for unlading or discharging merchandise or baggage from vehicle without permit of customs officer upon arriving in United States from contiguous country. 19 *USC* 1459.
>
> Forfeiture of merchandise and vehicle containing same for failure to report or manifest merchandise imported from contiguous country. 19 *USC* 1460.
>
> Forfeiture of merchandise and container thereof or closed vehicle containing same imported from contiguous country for failure to open container or vehicle upon demand of customs officer. 19 *USC* 1462.
>
> Forfeiture of vehicle and contents for failure to deliver sealed vehicle to proper customs officers, etc. 19 *USC* 1464.
>
> Forfeiture of vehicle used in unlawful importation, transportation, etc. of merchandise into United States. 19 *USC* 483.
>
> Forfeiture of vehicle used to possess, conceal, or transport contraband articles such as narcotic drugs, firearms, counterfeit coins, etc. 49 *USC* 782.

Forfeiture of aircraft used in violation of customs or public-health laws. 49 *USC* 181.

Forfeiture of goods, containers thereof, vessel or other conveyance containing same for removal or concealment of goods upon which tax has been imposed with intent to defraud United States of such tax. 26 *USC* 3321.

Forfeiture of goods, etc. together with other personal property (including vehicles) found in building, yard or inclosure with such goods, etc. for possession of such goods, etc. for purpose of sale or removal in fraud of internal revenue laws. 26 *USC* 3720.

Forfeiture of intoxicating liquors involved in violation of Liquor Enforcement Act and vehicle used in transporting same. 27 *USC* 224.

Forfeiture of liquor and conveyances thereof for introduction of liquor into Indian Reservation. 25 *USC* 246, 247.

Forfeiture of package or parcel containing unlawfully concealed letters. 39 *USC* 499.

Forfeiture of halibut and vessel employed therewith for violation of Northern Pacific Halibut Act. 16 *USC* 772.

Forfeiture of whales and vessels involved in violation of The Whaling Treaty Act. 16 *USC* 909, 910.

Forfeiture of tobacco and boxes, barrels, machinery, etc. for removal or sale of tobacco without giving bond required by law. 26 *USC* 2161.

The uniform practice of Congress in expressly and specifically forfeiting vehicles, vessels and containers

used in connection with these various law violations is significant as to the purpose and reason for the silence of 22 USC 401 with respect to the forfeiture of vessels and vehicles involved in its violation. It indubitably means that Congress saw fit not to impose the forfeiture of vessels and vehicles in cases arising under this statute.

The obvious reason for this is that in 1917 the truck was not in general use as we know of it today while cheap oceanic traffic had reached its maturity.

"Lusitania!" That was the torch of 1917! Although the debates and reports of the 65th Congress, 1st Session, Debates, House and Conference Reports do not help to clarify the precise point here, we would have to disregard history, our Declaration of War, our righteous anger over Prussian depredations on the high seas not to realize that Congress in 1917 had its lance poised over the Atlantic.

Border crossing by trucks was not contemplated by Congress.

It devolves as a consequence that Congress saw fit not to impose the forfeiture of vessels and vehicles under the statute as it would disrupt our ocean commerce to forfeit an ocean liner worth millions of dollars and a freighter worth hundreds of thousands of dollars for an attempted exportation of articles in violation of law. The vessels and vehicles were to be seized and detained for the purpose of search for articles destined for unlawful exportation. (22 U.S.C. 401.) This control of vessels and vehicles is necessary;

without it the statute is nugatory. But, if after summary hearing, the vessel or vehicle itself is not being exported unlawfully, it is restored to its status quo without delay. (22 U.S.C. 403.) The intendment of Congress is clear in this respect. (22 U.S.C. 401-408.)

POINT III.

ONLY EXPORTS AND ATTEMPTED EXPORTS OF ARTICLES, IN VIOLATION OF LAW, ARE SOUGHT TO BE FORFEITED BY CONGRESS.

The paramount purpose of Congress, as manifested by the text of 22 *U.S.C.* 401-408, is to restrict exports in time of war. 22 *U.S.C.* 401 applies only when *attempts* or *intentions to export* in violation of law are demonstrated.

An exportation is ably defined in *U.S. v. Hill,* 34 Fed. (2d) 133, as follows:

> "An exportation is a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country. The shipment of merchandise abroad with the *intention of returning the same to* the United States is not an exportation."

Applying this judical definition, do the facts in the case at bar demonstrate an attempted exportation or an intent to export in violation of law? The libelant did not produce one scintilla of evidence whereby respondent automobile was ever attempted to be severed from the mass of things belonging to the

United States. To the contrary, it was shown without dispute that the respondent automobile was always taken out of the United States with the intention of returning (daily border crossing), R. 12, Par. 11; R. 13, Par. 14; and that the respondent automobile always retained its American characteristics, e. g., American license plates and registration. (R. 12, Par. 11.)

POINT IV.

WAR STATUTES ARE CONSTRUED TO ACCOMPLISH THEIR IMPORTANT OBJECTIVES, BUT STATUTES IN DEROGATION OF PRIVATE PROPERTY, EVEN THOUGH THEY ARE WAR STATUTES, ARE STRICTLY CONSTRUED, AND AN INTENTION TO FORFEIT PRIVATE PROPERTY WILL NOT BE RAISED BY INFERENCE.

Opposing counsel, by argument, wish to *create* a statute to cover unique border conditions premised upon a statute enacted to control maritime exports. This is contrary to all principles of law, concisely presented in the Montesquieu theory of the division of powers. The judicial power of government *interprets* the law; the legislative power of government enacts the law. It is within the province of Congress to enact a law to cover unique border traffic in time of war, but up until such time as Congress chooses to do so, we are bound to interpret the law *as it is* not as we would wish it to be. The judicial branch of government cannot create laws, it may only interpret them.

Our established jurisprudence upon the construction of statutes is hereby briefly summarized:

"* * * in the application of strict construction, the courts refuse to enlarge or extend the law by construction, intendment, implication or inference, to matters not necessarily, or unmistakably implied, in order to give the statute full operation. These rules prevail even though the court thinks that the legislature ought to have made the statute more comprehensive."

50 *Am. Jur.*, 407, 408.

"* * * an intention to confiscate private property will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared. Similarly, no act of the legislature is to be construed as infringing upon the right of acquisition of property, unless its language *plainly and clearly* requires such a construction."

50 *Am. Jur.*, 424.

"The rule of strict construction of penal statutes generally requires that such statutes be constructed literally, or according to the letter."

50 *Am. Jur.*, 437.

"* * * A penal statute will not be construed to include anything beyond its letter, even though it is within its spirit."

50 *Am. Jur.*, 441.

In discussing the very section of the Espionage Act now under consideration, Judge Neterer in *United States v. 267 Gold Pieces and Automobile,* 255 Fed. 217, applied the rule of strict interpretation in the following language:

At page 219, Judge Neterer said:

> "A statutory power to divest the owner of title to the property is here enacted, and I think the mode of procedure prescribed by the act creating this power is complete and must be *strictly construed,* (italics supplied) and that the provisions are mandatory as to the essence of the thing to be done."

This statement would indicate that the statute would have been strictly construed had the point at bar been raised.

At this point, counsel feels that it would be helpful to the Court to reach for 255 F. and open the book at *page 220.*

The Court will no doubt note that Judge Neterer felt that the "spirit of the law is pregnant with points of protection (for private property) as indicated by the apt words used." The "apt words" which Congress used to restrict the statutory right of the government in the property, are many, as carefully noted by the learned Court, who stated,

> "* * * the criminal liability of the offender must not be confused with the statutory right of the government in the property."

Judge Neterer further stated:

> "Forfeiture by original seizure depends entirely upon the statute."

and at *page 221* Judge Neterer clearly indicated that the statute, 22 *U.S.C.* 401,

> "Instead of looking to the protection of the officer, sections 2 and 4 *bristle with provisions for the*

> *protection of private property* (italics supplied) and require a speedy investigation of all facts with relation to the seizure by the officers * * *''

and Judge Neterer concluded, at *page 221,*

> ''* * * even if the Congress could and had intended to destroy a vested right, the limitations would not have been provided and that *it would have done so in clear language from which there is no escape.''* (Italics supplied.)

CONCLUSION.

It is therefore submitted that forfeiture of the truck is not authorized by *Title VI of the Espionage Act of 1917;* for if Congress had intended that the vehicle be forfeited it would ''have done so in clear language from which there is no escape,'' such as Congress has already done in the other statutes cited.

It is further submitted that in all other similar cases tried and heard before other tribunals or departments, that the point at issue was not raised; and, consequently, these opinions would not be persuasive or helpful to this Court.

Wherefore, claimant-appellee respectfully prays that the respondent truck be re-delivered and restored to him as owner thereof, and that the Court's judgment below to this effect be sustained.

Dated, Nogales, Arizona,
November 7, 1945.

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